

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 19-0123

DAVID OLNEY)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 05/14/2019
)	
ELECTRIC BOAT CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Motion for Summary Decision of Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (The Law Office of Scott Roberts, LLC), Groton, Connecticut, for claimant.

Robert J. Quigley, Jr., and Sydney R. Kirsch (McKenney, Quigley & Clarkin, LLP), Providence, Rhode Island, for self-insured employer.

Before: BOGGS, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Motion for Summary Decision (2018-LHC-00825; 2018-LHC-00826) of Administrative Law Judge Jerry R. DeMaio rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked for employer as a pipefitter from 1986 to 1995 and then again from 2007 to 2017, when he retired. He underwent a total right knee replacement on September 14, 2012 and returned to work ten weeks later with no restrictions.¹ He was also off work from August 5 to October 15, 2015 for left knee pain and had partial left knee replacement surgery on August 17, 2016 and was out of work until November 12, 2016. He filed claims under the Act for scheduled permanent partial disability and medical benefits for injuries to both knees, alleging a date of injury of February 14, 2017. The parties stipulated that these claims were timely filed. Employer disputed the compensability of the claims and they were brought to a hearing before Administrative Law Judge McGrath on December 12, 2017.

While those claims were pending before Judge McGrath, claimant filed two additional claims for disability and medical benefits, which are the subject of this appeal. On November 27, 2017, he alleged that his left leg was injured on August 6, 2015, resulting in temporary total disability from August 6 through October 4, 2015; on December 14, 2017, he alleged that his right leg was injured on May 17, 2012, resulting in temporary total disability from May 17 through November 18, 2012. EXs A, B of Emp. Motion for Summary Decision. In each claim, he also requested medical benefits for treatment he received at West Bay Orthopedics, where he had his knee replacement surgeries. These claims were assigned to Administrative Law Judge DeMaio (the administrative law judge).

On July 12, 2018, employer filed a motion for summary judgment before Judge DeMaio alleging that these two more recently-filed claims are time-barred under Section 13 of the Act, 33 U.S.C. §913. Claimant did not file a response to the motion until August 22, 2018, which was received by the Office of Administrative Law Judges on August 27, 2018. The administrative law judge determined that claimant's response was untimely under 29 C.F.R. §18.33(d) because it was filed well after 14 days after employer's motion was filed. The administrative law judge therefore did not accept claimant's response and deemed employer's motion unopposed. Decision and Order at 2.

In ruling on employer's summary judgment motion, the administrative law judge noted that the dates of injury indicated on the claim forms were more than two years before the actual date of filing, which makes the claims appear untimely on their face.² Decision and Order at 3. He then considered the date claimant became aware or should have become

¹ Claimant appears to have received workers' compensation pursuant to Rhode Island law during the times he was off work for his knee injuries.

² Judge DeMaio noted the other claims that were then pending before Judge McGrath.

aware of the relationship between his employment, his injuries, and his disability.³ The administrative law judge concluded that the uncontradicted evidence established that claimant had knowledge of the connection between his injuries and his employment “at least by the dates alleged on his Forms LS-203, if not much earlier,” and therefore, his claims were untimely. *Id.* at 4. Accordingly, he granted employer’s motion for summary decision in a decision dated November 20, 2018 and filed by the district director on November 28, 2018. Claimant appeals that decision.

Thereafter, in a decision dated November 30, 2018, Judge McGrath found that claimant’s knee injuries and replacement surgeries are work-related. He awarded claimant permanent partial disability benefits for a 21 percent impairment to each leg. *Olney v. Electric Boat Corp.*, Case Nos. 2017-LHC-01539; 2017-LHC-01601 (Nov. 30, 2018) (McGrath Decision). He also awarded “past, present and future” medical benefits for these knee injuries. This decision was not appealed.

In this appeal, claimant argues that medical benefits are never time-barred, and therefore, his entitlement to them is a question of material fact that should have precluded summary decision. Employer filed a response brief, urging affirmance.

We affirm Judge DeMaio’s determination that claimant’s claims for disability benefits in 2012 and 2015-2016 are time-barred as unchallenged in this appeal. *See Scilio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). However, based on Judge McGrath’s unappealed determination, we also conclude that claimant is entitled to medical benefits. Judge McGrath specifically found that claimant’s knee surgeries were work-related. McGrath Decision at 17. He also awarded medical benefits to claimant, stating employer is “liable for *all past*, present and future medical expenses that are reasonably and necessarily incurred to treat Claimant’s . . . bilateral knee conditions.” *Id.* at 20 (emphasis added). Judge McGrath’s findings that claimant’s knee surgeries are work-related and that employer is liable for past medical expenses are binding under the principles of *res judicata* and may not be re-litigated. *See Holmes v. Shell Offshore, Inc.*, 37 BRBS 27 (2003). Thus, we need not remand the case for consideration of the medical benefits issue claimant raised before Judge DeMaio. Rather, based on Judge McGrath’s decision, we direct that if any medical benefits related to claimant’s work-related knee injuries remain unpaid or other issues exist concerning medical benefits, the parties first

³ Section 13(a) provides that, in a traumatic injury case, a claim must be filed within one year of the injury or the claimant’s date of awareness, and Section 13(b)(2) provides that, in an occupational disease case, a claim must be filed within two years of the claimant’s date of awareness. 33 U.S.C. §913(a), (b)(2).

raise the issue with the district director.⁴ *See Bath Iron Works Corp. v. Preston*, 380 F.3d 597, 610-611, 38 BRBS 60, 69(CRT) (1st Cir. 2004); 20 C.F.R. §§702.311, 702.407.

Accordingly, the administrative law judge's Decision and Order on Motion for Summary Decision is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

⁴ The district director "actively supervise(s) the medical care of an injured employee," which encompasses such issues as the character and sufficiency of medical care and the necessity for changes in physicians and/or facilities. 20 C.F.R. §702.407.